IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 05-CV-00329-TCK-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S RESPONSE TO "DEFENDANT COBB-VANTRESS, INC.'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF IN SUPPORT OF FIRST MOTION TO COMPEL"

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, ("the State"),[1] and responds to "Defendant Cobb-Vantress, Inc.'s Motion for Leave to File Supplemental Brief in Support of First Motion to Compel" ("Motion for Leave") [DKT #925] as follows:

1. The stated basis of Cobb-Vantress's First Motion to Compel was "whether Cobb-Vantress, a defendant in this case, will be permitted to discover the results of Plaintiffs' environmental sampling in the IRW" -- sampling which the State is claiming is protected from discovery on the basis of a work product claim. *See* First Motion to Compel, p. 2 [DKT # 743]. The sole stated basis in the Motion for Leave for allowing the filing of the proposed supplemental brief is the naked assertion that "[r]ecent events, including Plaintiff's service of Supplemental Rule 26(a) Disclosures on September 21, 2006, warrant the filing of a

[1] In the proposed supplemental brief attached to its Motion for Leave, Cobb-Vantress states that the plaintiff in this action is Attorney General W.A. Drew Edmondson. *See* Proposed Supplemental Brief, p.1 fn. 1. Cobb-Vantress is wrong. The State of Oklahoma is the plaintiff in this action. Cobb-Vantress's efforts to personalize this lawsuit are inappropriate.

supplemental brief in support of Cobb's pending Motion to Compel." Motion for Leave, p. 1. The Motion for Leave, however, fails to provide any explanation as to why the State's Supplemental Rule 26(a) Disclosure warrants the filing of a supplemental brief, which are disfavored under the Local Civil Rules. *See* LCvR 7.2(h) ("Supplemental briefs are not encouraged . . ."). The decision whether to grant the Motion to Leave should be determined based on the motion itself and not on a review of the accompanying proposed supplemental brief. In short, the naked assertion in the Motion for Leave is plainly insufficient to justify the granting of leave to file a supplement brief. As such, the Motion for Leave should be summarily denied.[2]

2. In the event that the Court in fact decides to consider the content of the proposed supplemental brief before deciding the Motion for Leave, it is clear that Cobb-Vantress's proposed supplemental brief goes far afield of the issue raised in Cobb-Vantress's Motion to Compel. To reiterate, "[s]upplemental briefs are not encouraged," *see* LCvR 7.2(h), and nothing in the proposed supplemental brief adds to or aids in the analysis of whether the State's environmental sampling information is discoverable at this stage in the litigation. Accordingly, on this basis the Motion for Leave is improper and should be denied.

3. Not only is it irrelevant to the issues raised by the Motion to Compel, but also the proposed supplemental brief is filled with scurrilous and shrill assertions, allegations and characterizations which can only be viewed as an improper and unfounded effort to impugn the integrity of the State in the eyes of the Court.[3] Accordingly, on this basis as well, the Motion for Leave is improper and should be denied.

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[2] Additionally, as another basis for denying the Motion for Leave, it should be noted that the proposed supplemental brief does not comply with the Local Rules. The proposed supplemental brief is 12 pages in length. LCvR 7.2(h) plainly provides that "supplemental briefs shall be limited to ten (10) pages in length unless otherwise authorized by the Court."

[3] Indeed, on at least three occasions in its proposed supplemental brief, Cobb-Vantress makes reference to Rule 11. There is absolutely no basis for raising Rule 11 with

I. ARGUMENT

A. The Motion for Leave Does Not State a Valid Basis for Overcoming the Presumption against the Filing of a Supplemental Brief

Although it asserts that "[r]ecent events, including Plaintiff's service of Supplemental Rule 26(a) Disclosures on September 21, 2006, warrant the filing of a supplemental brief in support of Cobb's pending Motion to Compel," *see* Motion for Leave, p. 1, Cobb-Vantress nowhere in its Motion for Leave cites to what specific "recent events" would warrant the granting of leave to file a supplemental brief or explains the reason why such unidentified "recent events" would warrant the granting of leave to file a supplemental brief. Further, Cobb-Vantress nowhere in its Motion for Leave explains why the State's Supplemental Disclosure would warrant the granting of leave to file a supplemental brief. Such naked assertions by Cobb-Vantress in its Motion for Leave are insufficient to overcome the heavy presumption against the filing of supplemental briefs. *See* LCvR 7.2(h).

Further, the State submits that Cobb-Vantress's burden cannot be satisfied by a review of the proposed supplemental brief itself. A review by the Court of the proposed brief itself in the course of its determination of the Motion for Leave would be tantamount to granting the Motion for Leave, for once the motion is reviewed, the bell cannot be unrung. Accordingly, the Motion for Leave must be determined solely with reference to the motion itself. Given that the motion itself does not state sufficient grounds, the Motion for Leave must be denied.

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respect to the State's case. As the court in *Greely Publishing Co. v. Hergert*, 233 F.R.D. 607, 612 (D. Colo. 2006), admonished:

> Counsel are reminded that Rule 11 should never be used as a litigation tactic. *See Caribbean Wholesales and Service Corp. v. U.S. JVC Corp.*, 2000 WL 964948 (S.D.N.Y. 2000). *Cf. Rateree v. Rockett*, 630 F.Supp. 763, 778 n. 26 (N.D. Ill. 1986) ("an improper Rule 11 motion may well call into play the well known legal proposition that people who live in glass houses shouldn't throw stones").

B. The Proposed Supplemental Brief is Irrelevant to the Matters at Issue in the Motion to Compel

In the event the Court does review the proposed supplemental brief in making its determination of whether to grant the Motion for Leave, it is clear that even a cursory review of the proposed supplemental brief reveals that it provides no assistance in resolving the matters placed before the Court by Cobb-Vantress's Motion to Compel.

1. The State has complied with both the letter and the spirit of the Federal Rules

Nothing in the State's September 21, 2006 Supplemental Rule 26(a) Disclosures warrants the filing of a supplemental brief on the question of whether the State's environmental sampling information being withheld on the basis of a work product claim is discoverable. Rather, the State's Supplemental Disclosure is wholly consistent with Fed. R. Civ. P. 26. Further, the State's Supplemental Disclosure in no way impacts the analysis of determining whether the State's work product is discoverable.

Rule 26(a)(1)(B) of the Federal Rules of Civil Procedure provides that:

> (1) Initial Disclosures. . . . [A] party must, without awaiting a discovery request, provide to the other parties:
>
> * * *
>
> (B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things, that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment.

Fed. R. Civ. P. 26(a)(1)(B) (emphasis added.) The State's Supplemental Disclosure does exactly what is required by the rule, *i.e.,* it sets forth a description by category of materials the State may

use to support its claims.[4] The mere disclosure of descriptions of the categories of materials the State may use to support its claims, however, does not make the materials that fall within the described categories automatically discoverable.[5] There must first be a Fed. R. Civ. P. 34 document request for the materials. *See, e.g., Kern River Gas Transmission Co. v. 6.17 Acres of Land*, 156 Fed. Appx. 96, 100 (10th Cir. 2005). And second, at that point, the party responding to the document request may make objections. *See* Fed. R. Civ. P. 34(b); Fed. R. Civ. P. 26(b)(3). Indeed, this is the procedural posture underlying Cobb-Vantress's Motion to Compel. Cobb-Vantress served discovery seeking the State's environmental sampling information, and the State objected on work product grounds. Cobb-Vantress then filed a Motion to Compel.

Cobb-Vantress has not cited a single case in its proposed supplemental brief supporting the proposition that Fed. R. Civ. P. 26(a)(1)(B) mandates the disclosure of work product material prior to a decision being made as to whether that work product material will be used by a testifying expert. In fact, *United States v. Dentsply International, Inc.*, 2000 WL 654378 (D. Del. May 10, 2000), supports the exact opposite conclusion. In that case, defendant Dentsply sought an order precluding the United States from using survey information generated under supervision of government experts on the ground that "the United States failed to identify the individuals who provided responses to the survey and to provide the written survey responses as part of its initial disclosures under Fed. R. Civ. P. 26(a)(1)." *Dentsply*, 2000 WL 654378, *1. As explained by the court in reasoning that is equally applicable here:

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[4] Cobb-Vantress apparently misunderstands the plain text of Rule 26(a)(1)(B). Rule 26(a)(1)(B) does not require actual production of documents. Rather, it merely requires "a description by category and location." Fed. R. Civ. P. 26(a)(1)(B).

[5] "The disclosing party does not, by describing documents under subparagraph (B), waive its right to object to production on the basis of privilege or work product protection, or to assert that the documents are not sufficiently relevant to justify the burden or expense of production." Advisory Committee Notes to 1993 Amendments to Rule 26.

> [R]equiring initial disclosure of survey responses would undermine the rule that parties are not compelled to disclose materials related to surveys commissioned in anticipation of litigation but not anticipated for use during trial. *See, e.g., Starter Corp.*, 1996 WL 693347 at *1 (denying plaintiff's request for production of documents generated by a survey that defendant commenced but did not intend to offer into evidence at trial); *Locite Corp. v. National Starch & Chemical Corp.*, 516 F.Supp. 190, 205 n. 24 (S.D.N.Y.1981) ("One should not discourage surveys for use in litigation, nor should one compel a party who has commissioned such a survey to introduce it at trial if it does not advance his case, particularly where his adversary 'equally . . . [can] commission and offer such a survey." ' (*citing Procter & Gamble Co. v. Johnson & Johnson, Inc.*, 485 F.Supp. 1185, 1201 n. 6 (S.D.N.Y.1979)); *Karan*, 82 F.R.D. at 685-86 (party not required to disclose survey materials at time when it had not yet decided whether it would use survey at trial). . . . Similar to *Karan*, the survey at issue here was conducted in anticipation of litigation and reflects the design, oversight, and analysis of the government's survey expert and economic expert. To require production of the completed survey questionnaires as part of the government's initial Rule 26(a)(1) disclosures would in this case require disclosure of "aspects of the theories of [the government's] experts." *Karan*, 82 F.R.D. at 685. To construe Rule 26(a)(1) to require parties to make initial disclosures of the survey materials and the identities of survey respondents of surveys commissioned in anticipation of litigation would potentially compel parties to disclose the work of non-testifying experts and surveys that a party does not intend to introduce at trial by requiring disclosure of such information prior to the party's decision. The Court cannot imagine Rule 26(a)(1) was intended to achieve this absurd result. Therefore, disclosure of such materials would not be required until and if the government determined it intended to use the survey at trial. *See Karan*, 82 F.R.D. at 685-86.

Dentsply, 2000 WL 654378, *5. Yet this is precisely the absurd result Cobb-Vantress apparently seeks.

2. The cases relied upon by Cobb-Vantress are off-point and distinguishable

Not only does it ignore the plain language of Rule 26, *see supra* Section I.B.1, but next Cobb-Vantress proceeds to cite and discuss a string of cases for the purported proposition that "numerous courts have concluded that test data must be produced in environmental litigation and have sanctioned efforts to hide adverse test results" -- all without disclosing the radically different circumstances underlying these rulings. *See* Proposed Supplemental Brief, pp. 10-12. For instance, in *In re DuPont–Benlate Litigation*, 918 F.Supp 1524 (M.D. Ga. 1995), the court

sanctioned DuPont, long after trial, for failing to produce test results after (1) those results were requested by the plaintiffs and DuPont promised to produce them, 918 F.Supp. at 1530 & 1544; (2) DuPont had agreed to produce the results in return for access to the plaintiffs' land for testing, 918 F.Supp. at 1529; (3) the court ordered their production and threatened a $500,000 sanction for failure to comply with discovery obligations, 918 F.Supp. at 1530; (4) DuPont's expert testified based upon summaries of the data without disclosing the underlying data, 918 F.Supp. at 1546-47, and misrepresented the data in his testimony, 918 F.Supp. at 1544; and (5) the plaintiffs demonstrated a "substantial need" for the data, and DuPont never put the data on any privilege log, 918 F.Supp. at 1548. It is beyond dispute that none of the conditions that contributed to a finding that DuPont had defrauded the court and the plaintiffs is present in the case before this Court. Moreover, significantly, the court in *DuPont-Benlate* recognized that the attorney-client privilege extended to representatives of attorneys and non-testifying experts, which actually supports the State's position and undercuts Cobb-Vantress's position in this matter. *See DuPont-Benlate*, 918 F.Supp. at 1547.[6] Simply put, this case has little, if anything, to do with answering the question of whether the sampling materials being withheld from production by the State on a claim of work product protection are discoverable.

Likewise, *Malautea v. Suzuki Motor Corp.*, 148 F.R.D. 362, 374-75 (S.D. Ga. 1991), does not inform the question presently before the Court. In *Malautea*, the court sanctioned the defendant and its counsel for failing to produce information about automobile design and marketing after being repeatedly ordered to do so by the court. The *Malautea* court had ordered production of routine information of the sort the State has already produced to the poultry integrator defendants in this matter, and not documents or information developed in anticipation

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[6] On appeal, the contempt sanction was set aside because the district court did not afford DuPont procedural protections sufficient to support a criminal contempt finding. *In re DuPont–Benlate Litigation*, 99 F.3d 363, 369 (11th Cir. 1996).

of litigation of the sort which is subject to the State's claims work product protection. *Malautea* simply has no applicability to the case at hand.

Finally, in *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 923 (1st Cir. 1988), the court considered an appeal based upon Fed. R. Civ. P. 60(b)(3) and held that failure to disclose or produce documents can constitute "misconduct" within the purview of this subsection of the Federal Rules. In *Anderson,* the defendant represented it had produced all responsive non-privileged documents, *see* 862 F.2d at 928, but in fact had failed to produce a report that dealt with the direction of underground water flow, whether pollution was present, and whether a neighboring tract of land contributed to the problems. The First Circuit upheld the trial court's findings, but remanded for the case to determine whether the report was intentionally withheld and whether failure to produce it had substantially interfered with the presentation of plaintiff's case. *Anderson,* 862 F.2d at 932. The case presented no claims of attorney-client privilege work product protection of the sort that are now before this Court.

Simply put, these cases are irrelevant to the issue of whether the State's work product sampling information is discoverable at this stage in the litigation.

C. The Proposed Supplemental Brief is an Unfounded and Improper Effort to Impugn the Integrity of the State

In its proposed supplemental brief, Cobb-Vantress strings together a line of unfounded and improper attacks on the State's lawsuit and the State's prosecution of its lawsuit. These unfounded attacks have absolutely nothing to do with whether the sampling information at issue in its Motion to Compel is protected as work product. The only apparent reason for such attacks would be to (undeservedly) cast the State in a bad light.[7 & 8]

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[7] *See, e.g., Pancoast v. Eldridge*, 259 P. 863 (Okla. 1927) ("'A brief in no case can be used as a vehicle for the conveyance of hatred, contempt, insult, disrespect, or professional

1. The State has adequate evidentiary support for the allegations set forth in the State's First Amended Complaint

Although having absolutely no bearing on the merits of Cobb-Vantress's Motion to Compel, Cobb-Vantress attempts to suggest that the State filed its lawsuit against the poultry integrators without adequate evidentiary support.[9] *See* Proposed Supplemental Brief, pp. 2 & 5. The fact of the matter is that ample evidentiary support exists supporting the allegations set forth in the State's First Amended Complaint. *See, e.g.,* Plaintiff State of Oklahoma's Reply to "Defendants' Response and Objection to Plaintiff's Motion for Leave to Expedite Discovery" [DKT #232]. Additionally, for example, the poultry integrator defendants have been provided with evidence of elevated levels of arsenic due to the conduct of the poultry integrators in the State's response to Tyson Chicken Interrogatory No. 8 and in the State's response to Tyson Poultry Interrogatory No. 11, elevated levels of hormones due to the conduct of the poultry integrators in the State's response to Tyson Poultry Interrogatory Nos. 3 and 11, elevated levels of microbial pathogens due to the conduct of the poultry integrators in the State's response to Tyson Poultry Interrogatory No. 4 and in the State's response to Cobb-Vantress Interrogatory No. 2, contamination of water due to the conduct of the poultry integrators in the State's response to Tyson Poultry Interrogatory No. 9, contamination of soil due to the conduct of the poultry integrators in the State's response to Tyson Poultry Interrogatory No. 9, contamination of biota

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discourtesy of any nature for the court of review, the trial judge, or opposing counsel'") (citation omitted).

[8] In the event the Court grants the Motion for Leave, the State will seek leave to respond to the allegations found in the proposed supplemental brief in full.

[9] On several occasions in the proposed supplemental brief, Cobb-Vantress incorrectly tries to characterize the State's lawsuit as one based solely upon human health issues. This characterization is incomplete. A review of the State's First Amended Complaint clearly reveals that the lawsuit is based upon numerous environmental and natural resource damage concerns, as well as human health concerns.

due to the conduct of the poultry integrators in the State's response to Tyson Poultry Interrogatory No. 9, and imminent and substantial endangerment to human health due to the conduct of the poultry integrators in the State's responses to interrogatories cited above and in the State's response to Tyson Foods Interrogatory Nos. 10 and 11. Against this backdrop, for Cobb-Vantress to contend that there is "a complete absence of even a good faith basis for this lawsuit" defies rational thinking.

2. The State has not delayed compliance with, evaded, or circumvented the discovery rules

Again, although having absolutely no bearing on the merits of Cobb-Vantress's Motion to Compel, Cobb-Vantress attempts to suggest that the State engaged in delay, or evaded or circumvented the discovery rules. As to the allegations of delay, Cobb-Vantress cannot legitimately claim any prejudice whatsoever in the delay in holding the Rule 26(f) conference. The fact of the matter is that until the State moved for expedited discovery, the poultry integrator defendants sat silent and never asked for a Rule 26(f) conference. In fact, if anything, it was the poultry integrator defendants who sought to delay the progress of the State's case, first by the filing of scores of third party claims, and second by requesting a stay while the State of Arkansas (unmeritorious) Supreme Court filing was disposed of. Moreover, in any event, when directed by the Court to hold the Rule 26(f) conference, the conference was promptly held.

To suggest that the delay in the Rule 26(f) conference was a pretext for the State to "surreptitiously" conduct discovery or to avoid this Court's authority to supervise discovery, *see* Proposed Supplemental Brief, p. 3, is preposterous. The simple fact of the matter is that the sampling done by the State during this time required neither the use of interrogatories, requests for production, requests for admission or depositions, nor the use of subpoenas.

Cobb-Vantress also asserts that the State filed its lawsuit without first conducting adequate investigation. Putting aside the fact that this assertion is incorrect, such pre-filing investigation would have occurred (and in fact did occur) without notice to the poultry integrator defendants and without Court involvement. The State was and is doing what any well-prepared litigant does. It gathered, and continues to gather, evidence through a variety of channels. There is certainly no rule that the opposing party need be made aware of all such efforts beforehand, or that recourse be made to only those devices provided for in the Federal Rules.

Cobb-Vantress also tries to find fault with the Oklahoma Department of Agriculture, Food and Forestry's ("ODAFF") issuance of administrative warrants to conduct sampling. Cobb-Vantress totally ignores the fact that ODAFF's request for the issuance of such warrants and the conduct of such sampling was (and is) fully within its statutory authority. *See* Oklahoma Constitution, Art. 6, § 31; 2 Okla. Stat. § 2-14; 2 Okla. Stat. § 2-4(A)(7) & (16); 2 Okla. Stat. § 9-10(A)(2)(a); 2 Okla. Stat. § 10-9.10; 2 Okla. Stat. § 10-9.20; 27A Okla. Stat. § 1-3-101(D)(1)(a) & (h). Cobb-Vantress's efforts to ascribe improper motives behind the request for the issuance of the administrative warrants to conduct sampling is therefore wholly without justification or merit.

Finally, citing merely to unsubstantiated allegations of a poultry grower in a newspaper article, Cobb-Vantress asserts that the State has "trespassed on private property in Arkansas and lands owned by the State of Arkansas" in the course of its sampling activities. *See* Proposed Supplemental Brief, pp. 3-4. The allegations of whether or not a trespass occurred are obviously disputed, plainly do not involve Cobb-Vantress, and in any event need not be resolved here. The simple fact of the matter is that such allegations are utterly irrelevant to the issues raised by the Motion to Compel. Indeed, the State can only assume that they are raised by Cobb-Vantress to distract the Court from the weakness of its position on the Motion to Compel.

In sum, although irrelevant to the issue pending before the Court, it is clear that the State has neither engaged in delay, nor evaded or circumvented the discovery rules.

3. The State's Rule 26(a) disclosure and supplementation fully complied with the Federal Rules

Yet again, although having absolutely no bearing on the merits of the Motion to Compel, Cobb-Vantress attempts to suggest that the State's Rule 26(a) disclosure was deficient. The fact of the matter is that the State's Rule 26(a) disclosure was a comprehensive description by category of documents the State may use to support its claim. *See, supra,* Section I.C.1. That the number of documents is voluminous should come as no surprise to the poultry integrator defendants, including Cobb-Vantress, given the size, scope and complexity of the case. In fact, just recently poultry integrator defendant Peterson Farms, Inc. served comprehensive discovery on the State which covers many of the categories of documents described by the State in its Rule 26(a) disclosure. If anything, this fact demonstrates that the categories of documents designated by the State reflect a high degree of relevancy and go to the factual basis of the State's lawsuit. Indeed, had it been less comprehensive in its Rule 26(a) disclosures, the State suspects Cobb-Vantress would be complaining that the State's disclosures were incomplete. Cobb-Vantress cannot have it both ways.

4. The State will disclose all evidence required under the Federal Rules

Finally, although having absolutely no bearing on the merits of the Motion to Compel, Cobb-Vantress attempts to suggest the State is improperly attempting to "conceal" evidence. Cobb-Vantress's position reflects a willful ignorance of what Fed. R. Civ. P. 26(a)(2), (b)(3) and (b)(4) require. The State will fully comply with its obligations under the Federal Rules with

respect to the disclosure of evidence, and any suggestion to the contrary is entirely without foundation.[10] *See* Section I.B.1 & 2.

For Cobb-Vantress to make assertions of misconduct by the State based upon the unsubstantiated words of a disgruntled former employee of the Office of the Attorney General who is involved in an employment lawsuit against that Office, *see* Proposed Supplemental Brief, p. 8, demonstrates nothing if not the depths to which Cobb-Vantress will sink in attempting to defend this lawsuit and to distract the Court from the real issues at hand. These assertions are far afield of anything remotely relevant to the Motion to Compel. It is unbecoming, and should not be countenanced by this Court.

II. CONCLUSION

For all of the above reasons, the State of Oklahoma respectfully requests the Court to deny Defendant Cobb-Vantress, Inc.'s Motion for Leave to File Supplemental Brief in Support of First Motion to Compel.

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[10] Cobb Vantress attempts to put a nefarious spin on Mr. Nance's comments during the August 10, 2006 hearing. Such attempts are wholly unwarranted and improper. Mr. Nance's comments are well-grounded in and fully consistent with Rule 26. *See* Fed. R. Civ. P. 26(a)(2)(B) ("The [expert] report shall contain a complete statement of . . . the data or other information considered by the witness in forming the opinions . . .") (emphasis added); *see also* Fed. R. Civ. P. 26(b)(3) (a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation").

Respectfully Submitted,

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